

John A. Krebs
408 Kiwanis Avenue
Huron, Ohio 44839

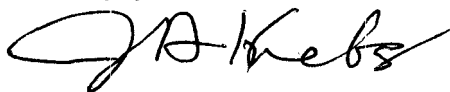
December 20, 2002

Molly Holt, Attorney Advisor NOAA
Office of the Asst Gen Council for Ocean Services
1305 East-West Highway, Room 611
Silver Springs, MD 20910

Dear Ms. Holt:

Included in this mailing are the copies of documents referred to in my comment letter, which will be e-mailed to you. Thank you for the opportunity to comment to the Secretary of Commerce, regarding my request that NOAA support the State of Ohio's denial of the Barnes Nursery coastal consistency. This project serves no national interest, has proven adverse effects and alternatives do exist.

Sincerely yours,

A handwritten signature in black ink, appearing to read "JA Krebs", written in a cursive style.

John Krebs

EXHIBIT 1

U.S. Environmental Protection Agency

**CLEAN WATER ACT SECTION 404(q)
MEMORANDUM OF AGREEMENT BETWEEN THE
ENVIRONMENTAL PROTECTION AGENCY AND THE
DEPARTMENT OF THE ARMY**

- ▼ Background
- ▼ Coordination Procedures
- ▼ Elevation of Policy Issues
- ▼ Elevation of Individual Permit Decisions

-
- 1. Authority:** Section 404(q) of the Clean Water Act, 33 U.S. C. 1344(q)
 - 2. Purpose:** Establish policies and procedures to implement Section 404(q) of the Clean Water Act to "minimize, to the maximum extent practicable, duplication, needless paperwork and delays in the issuance of permits."
 - 3. Applicability:** This agreement shall apply to Regulatory authorities under: a) Section 10 of the Rivers and Harbors Act of 1989; b) Section 404 of the Clean Water Act; and c) Section 103 of the Marine Protection, Research and Sanctuaries Act.
 - 4. General Rules:** Policy and procedures for the Department of the Army Regulatory Program are established in 33 CFR Parts 320 through 330, and 40 CFR Part 230.
 - 5. Organization:** This Memorandum of Agreement (MOA) is subdivided into four distinct parts. The procedure for each part are specific to that part and do not necessarily relate to other parts. For example, different signature levels are established for Parts II, III, and IV.
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PART I - BACKGROUND

1. The Army Corps of Engineers is solely responsible for making final permit decisions pursuant to Section 10, Section 404(a), and Section 103, including final determinations of compliance with the Corps permit regulations, the Section 404(b)(1) Guidelines, and Section 7(a)(2) of the Endangered Species Act. As such, the Corps will act as the project manager for the evaluation of all permit applications. As the project manager, the Corps is responsible for requesting and evaluating information concerning all permit applications. The Corps will obtain and utilize this information in a manner that moves, as rapidly as practical, the regulatory process towards a final permit decision. The Corps will not evaluate applications as a project opponent or advocate -- but instead will maintain an objective evaluation, fully considering all relevant factors. The Corps will fully consider EPA's comments when determining with the National Environmental Policy Act, and other relevant statutes, regulations, and

EXHIBIT 2(a)

Author: Kenneth Multerer at 3ms-rofo

Date: 07/21/2000 3:26 PM

Normal

Receipt Requested

TO: Kim.baker@dnr.state.oh.us at -INTERNET

Subject: Barnes Nursery

----- Message Contents

On June 14, 2000 I along with Gary Buck and Paul Wetzel (CE Bowling Green) met with Mr. Barnes for a site review of a proposal by Mr. Barnes to dig a channel in Lake Erie/Sandusky Bay to get water to his property. The channel was needed to insure a water supply if Lake Erie water levels dropped further. WE did a quick field review of the proposed project site. I Told Mr. Barnes that he should contact Ohio EPA since they would give him the biggest hassle because he wanted to spoil in the wetland/water.

At some time during the meeting it was mentioned that the project could be accomplished by building a dike to enclose the area to the south and create a managed wetland area. It was my impression that Gary was going to further discuss this with Mr. Barnes at a later time.

Gary Buck gave me a copy of a LOP or PCN (I am not really sure what it was since I did not read it) for the project and I brought it home with me.

A few days later Gary called and asked that I get rid or shred the document he had given to me at the site review. He stated Mr. Barnes was going to go with NWP NO. 27. I shredded the document he had provided.

EXH BIT 2 (b)

The following notes concerning events leading up to a meeting held on 14 June 2000 events which occurred in the meeting are entered on 19 Oct. 2000 at the direction of Mike Montone. The notes were reconstructed from memory and E-mail notes that I sent and received on the Barnes file. The reconstruction was required as portions of my E-mail and the Regulatory RAMS file were missing. In late April or early May 2000 I received a call from Mr. Barnes requesting a meeting to discuss the very low water levels of Lake Erie. I visited the site and Mr. Barnes gave me a tour of his nursery operation and irrigation system. The Barnes Nursery Business has been at that location for over fifty years. They have always obtained water for irrigation from Lake Erie. Prior to the high water periods of 1971-72 a barrier sand beach was intact and protected the landward marsh from severe lake level fluctuations. A concrete road which extended from the Sheldon Marsh entrance along side the barrier beach and connected to the existing Cedar Point Chausse where the condominiums are now located. When Cedar Point was unable to maintain that section of roadway they constructed a new access road West of the Barnes property. The causeway was bridged to allow water to enter the marsh and to be used by the Barnes Family for irrigation. Since 1971-72 the barrier beach was breached in several locations and the concrete road way was under water. As of April 2000 Mr. Barnes was very concerned with the Lake Erie water levels, and the published reports by the Army Corps of Engineers that the water level of Lake Erie could decline even further. He had several million dollars invested in potted plants and required over 250 k gallons of water daily. They had just gone through a twelve day period where they could not obtain water from Lake Erie. They were relying on their stored water. I suggested Mr. Barnes submit a Dept of Army permit application to construct an irrigation channel along the South and West side of Sheldon's marsh. Mr. Barnes indicated that in conversations with ODNR representative that they were not receptive to allowing him access to Lake Erie across Sheldon Marsh. They also would not allow him to do a directional bore pipeline under Sheldon Marsh. In May of 2000 Mr. Barnes submitted an application to me. At this time I sent E-mail messages to ODNR, OEPA, and USF&WLS concerning the application and requesting an on site meeting. On 16 May 2000 I sent E-mail messages to Ken Multer with the USF&WLS, Rick Queen OEPA, and Tim Shearer with ODNR. Paul Wetzel gave me the names and E-mail address as the Official Point of Contact for the agencies as he had used recently. The E-mail messages to the agencies stated "I have received an application from Barnes Nursery, Huron, Ohio. They propose to construct a irrigation ditch on private riparian lands along the West and South side of Sheldon Marsh. I would like to schedule a pre application meeting, on site, some time within the first two weeks of June. Could you please reply with the dates that you are not available and I will pick a date that is convenient to all." Ken Multer responded with a date that he was available. I sent another E-mail message to the above individuals advising to the scheduled 14 June 2000 date and asking if any one needed directions to the site.

1.2 / AM

EXHIBIT 2(c) page 1

File Memorandum

Date of Memo: September 15, 2000

Subject: Barnes Nursery Compliance Inspection

Author: Mike Montone

- 1) There was a site meeting on September 12, 2000 from 10 AM until 2 PM. Present were Dr. David Kler (ODNR), John Mack and Mick Miccashion (OEPA), and Paul Wetzel, Joe Kassler and myself (USACE).
- 2 There were two purposes to this site meeting
 - a) To perform a compliance inspection of the Barnes Nursery project.
 - b) To classify the project area and surrounding marsh using OEPA's ORAM classification system.
- 3) As per a letter from the Corps dated July 27, 2000, Mr. Barnes exceeded the limits set fourth by NWP 27, and NWP 27 is no longer valid for the balance of the proposed project. Mr. Barnes was also made aware that no additional work can be conducted without further authorization. Mr. Barnes voluntarily agreed to halt work on this project pending future authorization. Future work (i.e. irrigation ditch) will likely be evaluated under the Individual Permit process. The purpose of this compliance inspection was to identify the limits of the project already completed.

Observations made on September 12, 2000 indicate that the channel is approximately 50 feet wide and 4.5-5.5 feet deep. The berm is approximately 1700 feet long (this was difficult to measure because there was not a level, straight path to collect measurement with the wheel) and averages at least 6 feet in height, and 56 feet in width, along the length of the entire berm. An area at the western end of the berm was much higher and narrower. This appears as if this was done to avoid placing fill on ODNR's property.

Work completed by Barnes Nursery has exceeded the terms, conditions, and intent of the NWP 27 affirmed for this project.

- 4) OEPA evaluation of Sheldon's Marsh and the adjacent project area indicates that Sheldon's Marsh is a category 3 wetland (documentation in hard file). However, work completed thus far by Barnes Nursery may not have been in a wetland. The Corps has jurisdiction over the entire Marsh complex, this includes the open water habitat, the mudflats, and the vegetated shallows. Determining where the actual wetland begins (where all three characteristics according to the 1987 manual are present, i.e. hydric soils, hydrophytic vegetation, and hydrology) is

difficult and is compounded by the disturbance from this project. Pictures forwarded from ODNR indicate that the equipment used to do the work was in open water. To be considered a wetland, vegetation would of had to exist in the project area. Hydrophytic vegetation is present directly adjacent to the project boundary, at the western end of the project. There is also evidence that dredge materials deposited on the berm contain portions of *Phragmites*. This area was likely wetlands before the project began.

5) I met with Mr. Barnes after our site inspection. I indicated that pending an official letter from OEPA, the marsh and the surrounding wetlands will be considered category 3 wetlands according to OEPA ORAM. I also stated that the Corps agrees with OEPA's findings. This means that any additional work to be proposed in this area that involves the discharge of dredge or fill material into wetland areas would be evaluated using the individual permit process. Mr. Barnes remarked that "we all know that won't get anywhere." I agreed that the IP process could be lengthy and that there are no guarantees that any future projects will be authorized or denied. I stressed that while applying for an individual permit is his right, we can not comment on the project until such project plans are submitted. ✓

We also discussed the fact that the channel and berm were not in compliance with conditions of the permit that Mr. Barnes acted under. Mr. Barnes agrees that he will have to come into compliance with the intent of the original permit for the portion of the project already completed.

I also reiterated to Mr. Barnes the need to have an authorization statement from the partners of CCCMB for the activities he already completed under the original permit application. Mr. Barnes copied the authorization statement and agreed to get back to me.

Lastly I asked Mr. Barnes to begin operations to seed the berm with annual rye (annual rye was recommended by ODNR and SWCS). I explained that this would be considered an interim measure to stabilize the berm until a final resolution is achieved for this project.

6) I will write a letter to Mr. Barnes summarizing the results of this site inspection and detailing to him that he must come into compliance with the terms and conditions of the original permit, that he must seed the berm in order to stabilize it (condition of all nationwide permits), and that additional information is necessary in order to complete the individual permit process.

Mike Montone
Biologist

M.M.
CORPS
HAD TO
PAY
THEM
OCT 11

Montone, Michael G LRB

ORIGINAL PROJECT MANAGER

From:

Buck, Gary R LRB

Sent:

Thursday, August 17, 2000 7:41 PM

To:

Frapwell, Philip D LRB

Cc:

Montone, Michael G LRB

Subject:

Barnes Nursery

Phil

The following are answers to question you asked me earlier today....

CCCMB stands for C... Cedar Point C.... Corso C... Corso M.... Murray B.... Barnes

The application was verified to be signed by the three Corps representative present, and Mr. Barnes verified it was his signature.

No discernable turbidity was observed coming off the water's edge of the proposed nesting islands, as was alleged.

Please keep tract of all allegations made by this person as I am sure a legal suit will be filed against the individual.\

Gary Buck

EXHIBIT 3(a)



SIERRA
CLUB
FOUNDED 1892

MIDWEST OFFICE
Cleveland

03 OCT -5 PM 2: 04

Lt. Colonel Glen R. DeWillie
District Engineer Department of the Army
Buffalo District Corps of Engineers
1776 Niagara St.
Buffalo, NY 14207-3199

Oct. 2, 2000

RE: CCCMB's wetlands project adjacent to Sheldon's Marsh State Nature Preserve (file #2000-02170)

Dear Lt. Colonel DeWillie,

I am writing on behalf of the Sierra Club Great Lakes Program to ask that you use whatever authority you have available to you to require the restoration of damage done under a nationwide permit, NWP 27, issued by the Army Corps of Engineers for a project adjacent to Sheldon's Marsh State Nature Preserve in Erie County, Ohio. Though the project was halted and the permit authorization has been rescinded, we believe the uncompleted project is causing negative impacts to a Category 3 wetland, and immediate restoration should be ordered.

A review of the Army Corps' files on this project, obtained through a Freedom of Information Act request, reveals that the Corps made numerous errors of judgment in evaluating this proposal. Repeatedly, key decisions were made in the wrong direction. But, regardless of the errors made by the Army Corps, possession of a permit from the Corps did not relieve the permittee of responsibility for compliance with other wetland and water quality regulations. As indicated in a June 20, 2000 letter from the Corps to the permittee, the affirmation of NWP 27 "does not obviate the need to obtain any other project specific Federal, state, or local authorization".

We believe that the record shows that the permittee failed to obtain these authorizations. For instance, in a letter dated July 21, 2000, Mr. Wayne Warren, Chief of Real Estate and Land Management for the Ohio Department of Natural Resources, wrote to Lt. Col. Glen R. DeWillie, District Engineer for the U.S. Army Corps of Engineers in Buffalo asking that the Army Corps immediately revoke the nationwide permit for this project because "The applicant has failed to comply with the terms and conditions of the nationwide permit as it relates to consistency with the policies of the OCMP [Ohio Coastal Management Program] and the required state approvals." He goes on to say: "It is the

responsibility of both the permit applicant and the Corps of Engineers to be familiar with the OCMP.”

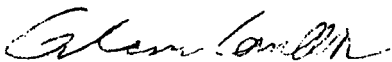
Documents in the Corps file also indicate that the project has gone, or would have gone, beyond the allowable impacts authorized by NWP 27. This is stated in a letter dated Aug. 1, 2000, in which Ms. Lisa Morris of Ohio EPA wrote the Army Corps about the project. According to Ms. Morris, “the footprint of the ditch and dike has already reached or exceeded 3 acres. Therefore, this project would exceed the impact threshold for all other NWPs even if it could be shown that the project area was a Category 2 wetland and was separable from other portions of the marsh.”

It is our belief that, whatever the mistakes that were made by the Corps, the applicant did not meet the legal obligation to obtain all the necessary authorizations, and has exceeded, or would have exceeded, the impacts allowed under the permit that was erroneously issued. We believe the appropriate and necessary remedy is to require the permittee to undertake the full restoration of the impacted area, so as to undo any damage that resulted from the project.

We hope you will use your authority to make this happen. This is necessary both to protect the area in question and to ensure that the integrity of the wetlands permitting process under the Clean Water Act.

Please feel free to contact me at the address or phone number below if you have any questions regarding this request.

Sincerely,



Glenn Landers
Sierra Club Cleveland Office
2460 Fairmount Blvd., Suite C
Cleveland Heights, Ohio 44106

216-791-9110



EXH1011 (b) page 1
DEPARTMENT OF THE ARMY

BUFFALO DISTRICT, CORPS OF ENGINEERS:
1776 NIAGARA STREET
BUFFALO, NEW YORK 14207-3199

REPLY TO
ATTENTION OF:

December 19, 2001

Regulatory Branch

SUBJECT: Barnes Nursery Environmental Assessment, Application
No. 2000-02170(1)

Mr. Glenn W. Landers
Sierra Club Great Lakes Program
2460 Fairmount Boulevard - Suite C
Cleveland Heights, Ohio 44106

Dear Mr. Landers:

This is in reference to your letter addressed to me, sent via electronic mail on December 17, 2001. You expressed your concern that further review of your written comments (originally delivered to the District on June 12, 2001, at our Public Hearing in Sandusky, Ohio) is necessary. The public hearing pertained to a request by Mr. Barnes for Department of the Army (D/A) authorization to maintain his previously constructed project with newly proposed modifications. Your comments in both letters addressed the manner in which Nationwide Permit No. 27 (NWP 27) was originally affirmed for Mr. Barnes' proposed irrigation channel in June 2000. Specifically, you criticized the actions of District biologist, Mr. Gary Buck.

The case specific authority affirmed by NWP 27 for Mr. Barnes project was suspended in November 2000, and then ultimately found to be inapplicable in January 2001, due to an error in the original affirmation. Therefore, the project partially constructed by Mr. Barnes was determined to be without D/A authorization. Mr. Barnes was given two options with regard to bringing his unauthorized project into compliance with Federal regulations: restore the site to pre-construction conditions or apply for after-the-fact authorization. Mr. Barnes elected to apply for D/A authorization to maintain his partially constructed project with newly proposed modifications. The permit application submitted by Mr. Barnes initiated our Individual Permit (IP) review process. The IP review process was the correct procedure for evaluating this project to determine if it could be authorized.

Regulatory Branch

SUBJECT: Barnes Nursery Environmental Assessment, Enforcement
No. 2000-02170(1)

The District considered all comments submitted by the public, and Federal, State and local agencies during our review, which was concluded with the completion of an Environmental Assessment (EA). The EA focused on the potential impacts to our Nation's aquatic resources and weighed the perceived detriments of this project against the perceived benefits. Therefore, the actions taken by District employees, including the manner in which NWP 27 was originally affirmed for this project, were not germane.

Work performed by District employees is reviewed internally by appropriate supervisors, and when necessary, action is taken to correct any errors. Specific to your concerns, the actions by all District staff during the original affirmation of NWP 27 for this project were reviewed and evaluated internally by the Chief of the Construction and Operation Division in conjunction with the District Commander. As a result of this review, measures were initiated and are currently in place to assure that such errors do not take place again.

Questions pertaining to this matter should be directed to me at (716) 879-4435, by writing to the following address: U.S. Army Corps of Engineers, 1776 Niagara Street, Buffalo, New York 14207-3199, or by e-mail at: michael.g.montone@usace.army.mil

Sincerely,

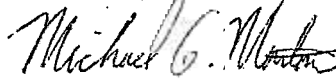
Michael G. Montone
Biologist

EXHIBIT 4(a)

GEORGE V. VOINOVICH
OHIO

317 HART SENATE OFFICE BUILDING
(202) 224-3353

TDD: (202) 224-6997

senator_voinovich@voinovich.senate.gov
www.senate.gov/~voinovich

United States Senate

WASHINGTON, DC 20510-3504

September 29, 2000

GOVERNMENTAL AFFAIRS
CHAIRMAN, SUBCOMMITTEE ON
OVERSIGHT OF GOVERNMENT MANAGEMENT
RESTRUCTURING AND THE
DISTRICT OF COLUMBIA

ENVIRONMENT AND
PUBLIC WORKS
CHAIRMAN, SUBCOMMITTEE ON
TRANSPORTATION AND INFRASTRUCTURE

SMALL BUSINESS

ETHICS

The Honorable Joseph Westphal
Assistant Secretary of the Army (Civil Works)
U.S. Army Corps of Engineers
108 Army Pentagon, Room 2E570
Washington, DC 20310-0108

Dear Dr. Westphal:

Recently, I have been contacted by several constituents regarding the restoration of Sheldon's Marsh and the Barnes Nursery permit action by the U.S. Army Corps of Engineers. This Section 404 permit action involves an impoundment in a wetland area adjacent to Lake Erie in the vicinity of Sandusky and Huron, Ohio. The permit area is private property adjacent to the Sheldon Marsh State Nature Preserve.

It has become apparent that in order to first secure the Nationwide Permit 27 for this project, the applicant intentionally misrepresented his project to the Corps. In addition, it is evident that the project was more a matter of water supply than environmental restoration for fish and wildlife. The U.S. Fish and Wildlife Service, the Ohio Department of Natural Resources and Ohio Environmental Protection Agency, concur with the Corps that the scope of this project exceeds the terms and conditions of the nationwide permit. The Corps has notified Barnes Nursery that they are not in compliance with the Nationwide Permit 27 and the work has been suspended.

The Corps has given Barnes Nursery until October 6 to provide a plan to bring the project into compliance with the permit. It is my understanding that the options include discontinuing the project and restoring the area or accomplishing interim stabilization measures and applying for an individual permit.

In light of the misrepresentation on the original nationwide permit, I urge the Corps to require Barnes Nursery to fully restore the area in a timely and efficient manner. I understand that Barnes Nursery can apply for a standard permit for the impoundment but believe full restoration should be accomplished while the individual permit is being considered.

Again, thank you for your consideration. I look forward to working with you on this matter.

Sincerely,



George V. Voinovich
United States Senator

STATE OFFICES:

5 EAST 7TH STREET
ROOM 2615
CINCINNATI, OHIO 45202
131 AREA 1265

1240 EAST NINTH STREET
ROOM 2955
CLEVELAND, OHIO 44114

37 WEST BROAD STREET
ROOM 970 (CASEWORK)
COLUMBUS, OHIO 43215

37 WEST BROAD STREET
ROOM 960
COLUMBUS, OHIO 43215

420 MADISON AVENUE
ROOM 1210
COLUMBUS, OHIO 43215

EXHIBIT 4(b)

Hon. George V. Voinovich

United States Senator

Hart Senate Office Bldg.

2nd & C Streets, NW

Room S.H.-317

Washington, D.C. 20510

July 18, 2000

Dear Senator Voinovich,

As a former member of the Coastal Resource Advisory Council during your term as Governor, I remember your particular interest in protection of sensitive wetland areas such as Sheldon's Marsh State Nature Preserve. In the recent week that area has come under a devastating siege by selfish private interests who border the marsh, altering this unique ecosystem perhaps irreparably. Being a lifelong resident and property owner on the contiguous border of Sheldon's Marsh, I cannot find words to describe the sinking feeling of abandonment by my federal and state governments. It was almost as gut-wrenching as leaving my young family for Viet Nam in 1970.

To the dismay of many interested parties, this project has been initiated under the guise of a "Nationwide Permit 27" (NWP-27) issued by the Army Corps of

Engineers (Toledo) for "wetlands enhancement" for a "waterfowl impoundment". There has never been an uglier "Trojan Horse".

We believe that, in fact, the project is for (1) water diversion or rerouting from Lake Erie, and (2) creating water impoundments from which to pump water to Barnes Nursery, Inc., both of which objectives are specifically prohibited by NWP-27. (see enclosed excerpts of NWP-27 "Ohio State Certification Special Conditions and Limitations", sections 27 and 29 (highlighted)).

Even if the permit application's intent *was* sincere, (and we have good reason to believe it was not), that purpose is also prohibited by NWP-27, section #27, which states that it applies only to *altered or degraded* non-tidal wetlands, not to *natural* wetlands. ("This NWP does not authorize the conversion of natural wetlands to another aquatic use, such as creation of waterfowl impoundments---)" Certainly Sheldon's Marsh has always been a pristine, *natural* wetlands of a particularly unique variety and *not* an *altered or degraded* one, at least not until this recent debauchery.

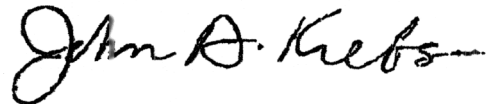
We believe that Gary Buck of the Army Corps (Toledo) was grossly mistaken or misinformed in his application of NWP-27 to this project and furthermore failed to properly inform (and I emphasize *properly*) other affected permitting agencies (state and federal) and other affected interested parties of this project.

We hope that you can come to our aid in this matter and intervene to effect some type of immediate and swift restraining order, injunction, or moratorium on the Army Corps's permit, to prevent further *daily* devastating damage, until all appropriate State and Federal authorities have been given the opportunity to review the permit. Since time is of particular essence for this highly sensitive area, we are hoping that you, at the Federal level, may have a swifter avenue to the ear of the Army Corps, which the State-Federal level may or may not be lacking at this point, to effect an *immediate* halt.

I have enclosed photographs of the newly constructed water impoundment area and the proposed path for water diversion from Lake Erie to Barnes Nursery, Inc.

If I can be of any assistance, please don't hesitate to call me at (419)-626-3272 (office) or at my home (419)-433-2132.

Sincerley,

A handwritten signature in cursive script that reads "John A. Krebs".

John A. Krebs, M.D.

408 Kiwanis Ave.
Huron, Ohio
44839



EXHIBIT 4 (e)
Buckingham, Lucal,
McGookey & Zeiher Co., L.P.A.

414 Wayne Street Sandusky, Ohio 44870 419 627-0414 FAX 419 627-0009
Email: LAWOFFICE@MOL.COM

00 JUL 31 AM 11:51

Dean S. Lucal
M. Lee McDermond, Jr.
John D. Frankel
James E. McGookey
*Kevin J. Zeiher
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Frederick D. Waldock
of counsel
Lawrence H. Schell,
of counsel
Thomas S. Buckingham, *ret.*
Richard D. Holzapfel, *ret.*
Arthur W. Zeiher, *ret.*

July 25, 2000

Lt. Col. Glen R. DeWillie, District Engineer
U.S. Army Corp of Engineers
Buffalo District
1776 Niagara Street
Buffalo, New York 14207-3199
Attn: Mr. Phil Frapwell

Re: Nationwide Permit 27 Issued to Barnes Nursery (PCN 2000-01800), Erie County, Ohio

Dear Lt. Colonel DeWillie:

I am writing to you on behalf of Dr. John Krebs and Patricia Dwight. Dr. Krebs and Mrs. Dwight are property owners adjacent to the area which will be, and has been, impacted by the issuance of the above permit. The Dwight property includes a conservation easement in favor of the State of Ohio to protect wetland areas which will also be directly impacted.

Both of these property owners have enjoyed living near the wetlands on the southern shores of Lake Erie. Both are very concerned with the environmental impact that the continued construction of the dike structure will have on the surrounding wetland area and thereby, their properties. I am aware that the Ohio Department of Natural Resources and the Ohio EPA have already written to you to express their concern over the appropriateness of the permit issued to Barnes Nursery. I will not reiterate their concerns herein for the sake of brevity. Let this letter serve, however, as my clients' support for the positions stated therein.

Letter To: Lt. Col. Glen R. DeWillie, District Engineer, U.S. Army Corp of Engineers
Re: Nationwide Permit 27 Issued to Barnes Nursery (PCN 2000-01800), Erie County, Ohio
Page Two.

xc: Dr. John Krebs
Patricia Dwight

EXHIBIT 5

Rationale For Decision
D/A Permit No. 2000-02170(0)
January 5, 2001

of 2

RATIONALE FOR DETERMINING THAT NATIONWIDE PERMIT NO. 27 IS NOT APPLICABLE

We have reviewed the entire case history. From the initial notification on this project, the purpose was stated as "irrigation" or constant water supply. This purpose was reiterated by the applicant throughout the entire administrative process leading to the affirmation of Nationwide permit No. 27 (NWP 27) and was repeated in the last meeting with the District Commander on December 1, 2000. The applicant's discussion as to how this project would benefit the aquatic environment appeared to be a reaction to the encountered opposition. The original secondary purpose of "providing wildlife habitat" gradually evolved into a plan to "restore the shoreline to historic marsh conditions and curtail erosion." The increasing level of concern raised by the District staff appears to have prompted this redefinition of the project purpose by the applicant (see *Supplemental Information: Summary of the Events Documented in the Public Record*, dated January 5, 2001).

We were provided with the applicant's most recent project description during a meeting with the District Commander on December 1, 2000. During this meeting the applicant stated that the project purpose was threefold in that it would create: waterfowl nesting islands, deep-water habitat, and a constant water supply for irrigation. The applicant expanded on these goals and presented a plan to illustrate how the creation of the channel and nesting islands would lead to the reestablishment of the near shore area (mudflats) to resemble historic marsh habitat (emergent wetlands) conditions. On face value, this replacement of the existing mudflats with the constructed irrigation ditch, the associated islands, and the proposed emergent shoreline wetlands is not necessarily an enhancement or a preferred condition. Furthermore, these project purposes may conflict with one another.

The entire project site is situated within an emergent wetlands/mudflat complex. Mudflats are considered a special aquatic site and as such, are afforded the same protection as wetlands under the 404(b)(1) guidelines. The conversion of the existing mudflats to upland nesting islands, open water, and emergent wetland will take an undetermined period of time and the success is questionable based on the dynamics of the area. The goals of water supply and deep-water habitat will be in direct conflict if low Lake levels and pumping operations overlap long enough to result in the irrigation ditch being pumped dry. Any aquatic organisms trapped in the dry channel will likely perish. Depending on the duration of low Lake levels, this could result in both short-term and long-term negative impacts on the created habitat. Nesting islands will not serve their intended function of providing an isolated refuge from terrestrial predators for breeding waterfowl when low Lake levels are present. As demonstrated by the applicant's request for authorization of this project, these impacts may occur during the growing season, which coincides with waterfowl nesting. For this reason, the creation of nesting "islands" to provide an isolated refuge does not make sense in an area which experiences a high degree and frequency of fluctuating water levels. However, the creation of upland areas within the mudflats would create additional habitat that waterfowl may use. Additionally, if stabilized and established, the chain of islands and channel could act as a barrier potentially decreasing wave energy and turbidity enough to promote the growth of indigenous emergent plants behind the structures. There is no apparent benefit to the creation of additional upland habitat when the establishment of this habitat will result in the irrevocable loss of the high quality habitat mudflats. In contrast, the mudflats in this area are well established and extensively used by shorebirds throughout the year. Therefore, conversion of the mudflats into upland areas and emergent wetland may not add value to the existing aquatic environment.

The portion of the project already constructed is an unpermitted activity since NWP 27 cannot be used to authorize its construction. In such cases, Federal regulations at 33 CFR Part 326 allow the

Rationale For Decision

D/A Permit No. 2000-02170(0)

January 5, 2001

2 of 2

applicant to apply for after-the-fact authorization. Since there is no Nationwide permit, Regional permit or Letter of Permission that can be used for the already completed work, an Individual permit (IP) requiring a public interest review is the only form of authorization that can potentially be used. An Individual permit authorizing a project in the coastal zone of Lake Erie is not valid unless the Ohio Department of Natural Resources (ODNR) issues a Coastal Zone Management (CZM) Federal consistency concurrence determination. In addition, an IP cannot be used pursuant to Section 401 of the Clean Water Act until Water Quality Certification (WQC), or waiver thereof, has been issued by the Ohio Environmental Protection Agency (OEPA). This project site is in the coastal zone of Lake Erie and involves the placement of fill within a wetland.

GEORGE V. VOINOVICH
OHIO

EXHIBIT 4(d)

317 HART SENATE OFFICE BUILDING
(202) 224-3353
TDD: (202) 224-6997
senator_voinovich@voinovich.senate.gov
www.senate.gov/~voinovich

United States Senate
WASHINGTON, DC 20510-3504

GOVERNMENTAL AFFAIRS
CHAIRMAN, SUBCOMMITTEE ON
OVERSIGHT OF GOVERNMENT MANAGEMENT
RESTRUCTURING AND THE
DISTRICT OF COLUMBIA
ENVIRONMENT AND
PUBLIC WORKS
CHAIRMAN, SUBCOMMITTEE ON
TRANSPORTATION AND INFRASTRUCTURE
SMALL BUSINESS
ETHICS

August 31, 2000

John A. Krebs, M.D.
408 Kiwanis Avenue
Huron, Ohio 44839

Dear John:

Thank you for your letter of July 18, 2000 concerning the Barnes Nursery permit action. I appreciate your concern that the important environmental resources of the Sheldon's Marsh and adjacent areas be protected.

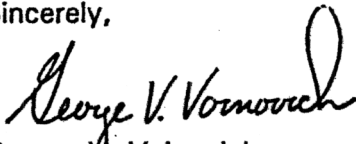
My staff has been in contact with the Army Corps of Engineers. The Corps has concluded that the Nationwide Permit 27 under which the work on the sub-impoundment is approved is no longer applicable since the scope of the project exceeds the terms and conditions of the Nationwide Permit. Also, it has become apparent that the project was more a matter of water supply than environmental restoration. This conclusion has been coordinated with the U.S. Fish and Wildlife Service and the Ohio Department of Natural Resources and Ohio Environmental Protection Agency, who all concur.

It is our understanding that Barnes Nursery will have the option of applying for an individual permit for the work or discontinuing the permit action and restoring the area. If an individual permit is sought, interim corrective measures would be required to provide stabilization and erosion control pending the outcome of the permit request.

You are to be commended for your efforts in assuring that appropriate consideration is given to the protection of the values and functions of these important wetlands.

Thank you again for contacting me. Please feel free to contact me again regarding this or any other issue that concerns you.

Sincerely,


George V. Voinovich
United States Senator

GVV/CB

STATE OFFICES:
36 EAST 7TH STREET
ROOM 2615
CINCINNATI, OHIO 45202
(513) 684-3265

1240 EAST NINTH STREET
ROOM 2955
CLEVELAND, OHIO 44114
(216) 522-7095

37 WEST BROAD STREET
ROOM 970 (CASEWORK)
COLUMBUS, OHIO 43215
(614) 469-6774

37 WEST BROAD STREET
ROOM 960
COLUMBUS, OHIO 43215
(614) 469-6697

420 MADISON AVENUE
ROOM 1210
TOLEDO, OHIO 43604
(419) 259-3895

Permit Suspension Meeting Notes
D/A Permit No. 2000-02170(0)
January 5, 2001

of 2

Supplemental Information Summary of the Events Documented in the Public Record:

On May 8, 2000 we sent a coordination letter to OEPA, ODNR and USFWS. In that correspondence we stated that Barnes Nursery proposed to construct an irrigation ditch along the south and west sides of Sheldon Marsh. We then affirmed a Nationwide permit No. 27 (NWP 27) on June 20, 2000. This authorized the creation of deep-water habitat and waterfowl nesting islands. Drawings attached to the affirmation letter depicted a linear channel and continuous berm. These drawings illustrated that the applicant originally intended to construct an irrigation ditch and side-cast the dredged material to create one continuous berm. The purpose of the berm was to act as a barrier to wave energy and maintain the integrity of the irrigation ditch. The letter of affirmation authorized nesting islands. However, the applicant did not submit drawings of nesting islands. The affirmation letter did not give specifications, or offer direction, for the construction of the nesting islands or deep-water habitat. At the time the permit was authorized, the applicant did not have an agent to assist in the immense task of restoring or enhancing the mudflats and shoreline of Sheldon Marsh. Application materials did not contain any information to indicate why nesting islands and deep-water habitat were desired, or how this would accomplish the creation, restoration, or enhancement of streams and/or wetlands. During the process leading to issuance of an affirmation letter, we did not explore project alternatives or provide adequate rationale for the permit decision.

On July 26, 2000, District members met with the agencies to review this case. At this meeting, the following information was conveyed:

- 1) Water supply was the primary purpose of the project
- 2) Wildlife (habitat) enhancement was a secondary benefit
- 3) The District would consider this a water supply project and notify Mr. Barnes that he has exceeded the limits of his NWP 27.

After this meeting a District representative met with Mr. Barnes on site. The District representative explained that Mr. Barnes would have to restore the site or apply for an after-the-fact authorization. Mr. Barnes responded that he needed this project because recent Lake levels have deprived him of a constant water source. He informed the District representative that he pumps an estimated 100,000 to 250,000 gallons of water each evening to water his stock (from April to October). Mr. Barnes did not mention restoration or enhancement of the marsh at this meeting.

On August 15, 2000, Mr. Barnes submitted a request for an Individual permit. On August 17, 2000, District members met again with Mr. Barnes on site. Mr. Barnes presented a history of the marsh and how he believed the marsh had been degraded over time. He also informed the District staff that his project would restore his shoreline to historic marsh conditions.

On September 20, 2000, we opted to pursue applicant's non-compliance with the terms and conditions of the affirmed permit. We requested that Mr. Barnes submit a compliance plan to obtain consistency with the terms and conditions of NWP 27. Mr. Barnes submitted a compliance plan on September 29, 2000. The compliance plan was prepared by Mr. Charles E. Herdendorf and focused on correcting dimensions of the channel and berm, but did not discuss habitat restoration or enhancements. The District did not accept this plan.

Permit Suspension Meeting Notes
D/A Permit No. 2000-02170(0)
January 5, 2001

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The permit affirmation was suspended on November 6, 2000. As per suspension procedures, Mr. Barnes and his agent were given the opportunity to present additional information to the District Commander. This was done in a meeting in Buffalo on December 1, 2000. During this meeting, Mr. Herdendorf stated that the project had three goals: the creation of waterfowl nesting islands, the creation of deep-water habitat, and obtaining access to a water supply (in that order). Mr. Barnes later informed us that his foremost concern was access to a constant water supply. In addition, Mr. Barnes and his agent explained how this project would restore the area behind the channel to historic marsh conditions. His agent also criticized ODNR and their actions or lack of action in managing the marsh (documented in meeting notes).

Permit Suspension Decision Document
D/A Permit No. 2000-02170(0)
January 5, 2001

of

PERMIT SUSPENSION DECISION DOCUMENT

Before determining whether or not to modify or revoke a case specific Nationwide permit (NWP) authorization, it first must be determined if the activity as originally proposed was properly authorized by the NWP at the time the affirmation was issued. If it was not, the affirmation was issued in error and the activity was never authorized by the NWP. If it was properly affirmed, then the District Engineer must consider the factors discussed in the Federal regulations at 33 CFR 330.5(d) to determine if there is reason to modify or revoke the affirmation.

In order to determine if the Nationwide permit affirmation was appropriate, we must first and foremost determine what the overall and basic project purposes are.

The Corps of Engineers water resource program Standard Operating Procedures (SOP) states: "The overall project purpose is more specific to the applicant's project than the basic project purpose. The overall project purpose is used for evaluating practicable alternative under the Section 404(b)(1) guidelines. The overall project purpose must be specific enough to define the applicant's needs, but not so restrictive as to preclude all discussion of alternatives." We make this determination based on the review and consideration of information submitted by the applicant.

We have determined that the overall project purpose is to provide a constant water supply to an irrigation pump.

The SOP further states: "The basic project purpose must be known to determine if a given project is "water dependent."

We have determined that the basic purpose of this project is to provide irrigation water to nursery plants.

We have also determined that the applicant's stated goals of creating waterfowl nesting islands and deep-water habitat are secondary to the creation of a constant water supply for irrigation. These goals should only be considered for the purpose of mitigating the temporary and permanent impacts associated with this water supply project. The goals of mitigation are not considered when determining the overall or basic project purpose.

Conclusion: NWP 27 as published in 61 FR 65917 and modified in 65 FR 12888, and in compliance with Federal Regulations at 33 CFR Part 330, does not authorize activities whose primary purpose is water supply. Authorization under NWP 27 is limited only to those activities where the restoration and enhancement of waters of the United States is the primary project purpose. Therefore the case specific authorization for this project as originally affirmed under NWP 27 was issued in error. This NWP does not authorize the activity originally proposed and subsequently constructed by Mr. Barnes. Furthermore, there are no Nationwide permits, Regional permits, or Letters of Permission that would authorize the project as constructed. An after-the-fact Individual permit requiring a public interest review represents the only valid form of authorization for this project.

The options to reinstate or modify the originally affirmed NWP 27 are therefore not applicable based on the facts related to this case.



DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
CIVIL WORKS
108 ARMY PENTAGON
WASHINGTON DC 20310-0108

REPLY TO
ATTENTION OF

Honorable George V. Voinovich
United States Senate
Washington, D.C. 20510-3504

Dear Senator Voinovich:

I am writing in response to your letter of September 29, 2000, relaying concerns about the restoration of Sheldon's Marsh and the Barnes Nursery permit action under the jurisdiction of the Army Corps of Engineers Buffalo District. Your letter suggests that the Barnes Nursery intentionally misrepresented their project in order to qualify for authorization under Nationwide Permit 27. In light of this view, you would like the Corps to require Barnes Nursery to restore fully the work area pending consideration of an individual permit.

Regulatory staff from the Buffalo District have informed us that Mr. Robert Barnes was authorized, under Nationwide Permit 27, to construct deep-water habitat and nesting islands on private lands adjacent to Sheldon's Marsh. However, upon learning that the project, as constructed, exceeded the limits of this permit, District staff asked Mr. Barnes to discontinue work pending resolution of this non-compliance situation. Mr. Barnes could apply for after-the-fact authorization of the work that has been completed. However, the District advises that as of today, Mr. Barnes has not sought any additional authorization. Instead, Mr. Barnes is working cooperatively with Buffalo District staff to develop and implement a plan to voluntarily bring his project into compliance with Nationwide Permit 27. This approach is fully consistent with the Corps of Engineers general desire to resolve non-compliance violations cooperatively and in a non-confrontational manner. In these situations, the Corps typically seeks complete restoration only when it is clear that the work cannot be authorized.

Corps staff have informed me that they have no evidence of any intent by Barnes Nursery to misrepresent this project. As a point of general information, the Corps has no independent authority to address such issues. If proof of deliberate misrepresentation was available, and if the attendant circumstances were sufficiently egregious, the District could exercise its discretion to seek prosecution by the U.S. Attorney on relevant grounds. However, the final decision would be the U.S. Attorney's. Since there is no evidence of any need for punitive action in the Barnes Nursery case, the Corps has focused its enforcement effort on protecting and restoring the affected aquatic environment through an administrative remedy. Corps districts have substantial independent discretion in enforcement matters. However, my staff have reviewed the facts of this case with staff from the Corps Headquarters and agree that the best approach for resolving this matter is to have Mr. Barnes voluntarily perform restorative work sufficient to bring his overall project into compliance with Nationwide Permit 27.

CECW-OR


EXHIBIT 6 (page 2)

-2-

I hope that this information is responsive to your concerns. If you have additional questions about this matter or the related Corps policy, please have your staff contact Mr. Chip Smith, my Assistant for Regulatory and Environmental Affairs at (703) 693-3655 or let me know and I will be happy to meet with you on this matter.

(4)

Sincerely,



Joseph W. Westphal
Assistant Secretary of the Army
(Civil Works)

EXHIBIT 7

§ 1517.06 Preserves held in trust.



<http://onlinedocs.andersonpublishing.com/revisedcode/text.cfm?GRDescription2=title%2015&GRDescription3=text%20of%20statute&GRStructure1=1517&GRStructure2=1517%2E06&TextField=%3CJD%3A%221517%2E06%22%3E%A7%201517%2E06%20Preserves%20held%20in%20trust%2E>

Last Updated: 2001-04-24 18:37:02

§ 1517.06 Preserves held in trust.

Text of Statute

Nature preserves dedicated under section 1517.05 of the Revised Code are to be held in trust, for the uses and purposes set forth in section 1517.05 of the Revised Code, for the benefit of the people of the state of present and future generations. They shall be managed and protected in the manner approved by, and subject to rules established by the chief of the division of natural areas and preserves. They shall not be taken for any other use except another public use after a finding by the department of the existence of an imperative and unavoidable public necessity for such other public use and with the approval of the governor. Except as may otherwise be provided in the articles of dedication, the department may grant, upon such terms and conditions as it may determine, an estate, interest or right in, or dispose of, a nature preserve, but only after a finding by the department of the existence of an imperative and unavoidable public necessity for such grant or disposition and with the approval of the governor.

HISTORY: 133 v S 113 (Eff 8-31-70); 136 v H 972. Eff 9-1-76.

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US Army Corps
of Engineers.

Headquarters

Corps Facts

Date: Mar. , 2000

SUBJECT: Regulatory Decision Safeguards

Introduction

The permit evaluation process contains many safeguards designed to ensure objectivity in the evaluation process. Even before an application is formally submitted, such safeguards come into play, for example, in the pre-application consultation stage.

Internal Safeguards

< Probably the single biggest safeguard of the program is the Corps public interest review, which also forms the main framework for overall evaluation of the project. This review requires the careful weighing of all public interest factors relevant to each particular case. Thus, one specific factor (e.g., economic benefits) cannot by itself force a specific decision, but rather the decision represents the net effect of balancing all factors, many of which are frequently in conflict. >

✓ The public interest review is used to evaluate applications under all authorities administered by the Corps. There are additional evaluation criteria used for specific authorities. For example, applications for fill in waters of the United States are also evaluated using, the Section 404(b)(1) Guidelines developed by EPA in conjunction with the Department of the Army. These guidelines are heavily weighted towards preventing environmental degradation of waters of the United States and so place additional constraints on Section 404 discharges. Likewise, ocean dumping permits (Section 103) are evaluated using special criteria developed by EPA in consultation with Army. These criteria are also primarily aimed at preventing environmental degradation and set up some very stringent tests which must be passed before a Section 103 permit can be granted. Although required for permit issuance, compliance with these authority specific criteria is only a part of the public interest review. Therefore, projects which comply with the criteria may still be denied a permit if they are found to be contrary to the overall public interest. ✓

External Safeguards

There are several external safeguards which work to maintain objectivity. One is EPA's Section 404(c), also called "veto" authority. EPA may prohibit or withdraw the specifications of any disposal site if the EPA Administrator determines that discharges into the site will have unacceptable adverse effects on municipal water supplies, shellfish

beds and fishery areas, wildlife, or recreational areas. This authority also carries with it the requirement for notice and opportunity for public hearing. EPA may invoke this authority at any time. An application need not be pending.

Section 404(q) of the Clean Water Act requires the Department of the Army to enter into interagency agreements to minimize duplication, needless paperwork, and delays in the Section 404 permit process. Current agreements allow EPA and the Department of Commerce and the Interior to request higher level review within the Department of the Army when they disagree with a permit decision which is about to be made by the district engineer. Higher level review can only be requested when certain criteria are met and must be conducted within time limits specified in the agreements. The agreements also provide for the elevation of policy issues. The decision on such requests is made by the Assistant Secretary of the Army for Civil Works.

Individual state permitting and water quality certification requirements provide an additional form of objective safeguard to the Corps regulatory program. Section 401 of the Clean Water Act requires state certification or waiver of certification prior to issuance of a Section 404 permit.

Section 307 of the Coastal Zone Management Act of 1972, as amended (16 U.S.C. 1458(c)), requires that the applicant certify that the project is in compliance with an approved State Coastal Zone Management Program and that the State concur with the applicant's certification prior to a Corps permit being issued. The Corps' standard permit form contains a statement notifying the permittee that the Federal permit does not remove any requirement for state or local permits. This has the effect of making the Corps' permit unusable without these additional authorizations. If the state or local permit is denied before the Corps has made its decision, the Corps permit is also denied.

In addition to these requirements, the Corps' implementing regulations require that district engineers conduct additional evaluations on applications with potential for having an effect on a variety of special interests (e.g., Indian reservation lands, historic properties, endangered species, and wild and scenic rivers).

Another form of external safeguard, of course, is legal challenge of a permit decision. A permit applicant or landowner must appeal a permit decision prior to filing a lawsuit. However, any member of the public, may challenge, in court, a Corps decision to issue or deny a permit. Generally, such a challenge alleges failure to comply with procedural requirements, such as NEPA documentation, the 404(b)(1) Guidelines, or the procedures in the Corps permit regulations.



**US Army Corps
of Engineers.**
Headquarters

Corps Facts

Date: Mar. 1, 2000

SUBJECT: Regulatory Program Overview

Introduction

The Department of the Army regulatory program, one of the oldest in the Federal Government, initially served only to protect and maintain the navigable capacity of the nation's waters. Changing public needs, evolving policy, and new statutory mandates have added to the program's breadth, complexity, and authority.

Program goals

The following goals were established at the Corps of Engineers 1991 national regulatory conference. The goals guide policy development, as well as daily regulatory business in the Corps' districts and divisions. Each is equally important and there is no meaning to the order in which they are listed.

- To provide ~~strong protection~~ of the Nation's aquatic environment, including wetlands.
- To enhance the efficiency of the Corps administration of its regulatory program.
- To ensure that the Corps provides the regulated public with fair and reasonable decisions.

Legislative Authorities

Section 10

The legislative origins of the program are the Rivers and Harbors Acts of 1890 and 1899. Various sections establish permit requirements to prevent unauthorized obstruction or alteration of any navigable water of the United States. The most frequently exercised authority is Section 10 (33 U.S.C. 403) that covers construction, excavation, or deposit of materials in, over, or under navigable waters.

Section 404

In 1972, amendments to the Federal Water Pollution Control Act added the Section 404 authority (33 U.S.C. 1344) to the program. The Secretary of the Army, acting through the Chief of Engineers, is authorized to issue permits, after notice and opportunity for public hearings, for the discharge of dredged or fill material into waters of the United States at specified disposal sites. Selection of such sites must be in accordance with guidelines

agreement with EPA, the discharge of dredged material in the territorial seas is regulated under the Section 103 criteria rather than those developed for Section 404.

Delegation of Authority

Most of these permit authorities have been delegated by the Secretary of the Army to the Chief of Engineers and his authorized representatives. Those exercising these authorities are directed to evaluate the impact of the proposed work on the public interest. This delegation recognizes the decentralized nature and management philosophy of the Corps of Engineers organization. Regulatory program management and administration is focused at the district office level, with policy oversight at higher levels

The backbone of the program is the Department of the Army regulations (33 CFR 320-330) which provide the district engineer the broad policy guidance needed to administer day-to-day operation of the program. These regulations have evolved over time, changing to reflect added authorities, developing case law, and in general the concerns of the public. They are developed through formal rule making procedures.

A district engineer has the authority under Part 325.8 to make a final decision on a permit application. However, permit applicants and landowners may appeal permit denials, rejected permit conditions and jurisdiction determination (coming in the year 2000) for compliance with policy and procedural requirements.

Processing Steps

The basic form of authorization used by Corps districts is the standard individual permit. Processing involves evaluating project-specific applications in basically three steps: pre-application consultation (for major projects), formal project review, and decision making.

Pre-application consultation usually involves one or several meetings between an applicant, Corps district staff, interested resource agencies (Federal, state, or local), and sometimes the interested public. The meetings are used to discuss informally the pros and cons of proposals before applicants make irreversible commitments of resources (funds, detailed designs, etc.). The process is designed to give applicants an assessment of some of the more obvious alternatives available to accomplish the project purpose, to discuss measures for reducing the impacts of the project, and to inform them of the factors the Corps must consider in decision-making.

Once a complete application is received, the formal review process begins. Corps districts operate under what is called a project manager system, where one individual is responsible for handling an application from receipt to final decision. The project manager prepares a public notice, evaluates the impacts of the project and all comments received, negotiates necessary modifications of the project if required, and drafts or oversees drafting of appropriate documentation to support a recommended permit decision. The permit decision document includes a discussion of the environmental

impacts of the project, the findings of the public interest review process, and any special evaluation required by the type of activity.

The Corps supports a strong partnership with states in regulating water resource developments. This is achieved with joint permit processing procedures (e.g., joint public notices and hearings), programmatic general permits founded on effective state programs, transfer of the Section 404 program in non-navigable waters, joint environmental impact statements, special area management planning, and regional conditioning of nationwide permits.

Permit Decision

The Corps' public interest balancing process carries great importance to the project evaluation. The public benefits and detriments of all factors relevant to each case are carefully evaluated and balanced. Relevant factors may include conservation, economics, aesthetics, wetlands, cultural values, navigation, fish and wildlife values, water supply, water quality, and any other factors judged important to the needs and welfare of the people. The following general criteria are considered in evaluating all applications:

1. the relevant extent of public and private needs;
2. where unresolved conflicts of resource use exist, the practicability of using reasonable alternative locations and methods to accomplish project purposes; and
3. the extent and permanence of the beneficial and/or detrimental effects the proposed project may have on public and private uses to which the area is suited.

No permit is granted if the proposal is found to be contrary to the public interest.

Alternate Forms Department of Army Permits

Alternate forms of authorization are used in certain prescribed situations. Letters of permission may be used where, in the opinion of the district engineer, the proposed work would be minor, not have significant individual or cumulative impact on environmental values, and should encounter no appreciable opposition. In such situations, the proposal is coordinated with all concerned fish and wildlife agencies, and generally adjacent property owners who might be affected by the proposal, but the public at large is not notified.

Another form of authorization is the general permit. General permits cover activities the Corps has identified as being substantially similar in nature and causing only minimal individual and cumulative environmental impacts. These permits may cover activities in a limited geographic area (e.g., county or state), a particular region (e.g., group of contiguous states), or the nation. The Corps element developing such permits is that one which has geographic boundaries encompassing the particular permit. Processing such

BARNES NURSERY INC

3511 West Cleveland Rd. Huron, Ohio 44839

419 433 5521 phone 800 421 8722 toll free 419 433 3555 fax



January 22, 2001

Lt. Col. Glen R. DeWillie
District Engineer
Buffalo District, Corps of Engineers
1776 Niagara Street
Buffalo, NY 14207-3199

Dear Col. Willie,

I am very disappointed in your decision of January 8th, 2000 declaring our project in Sandusky Bay as "unpermitted". The project was constructed in good faith in conjunction with advice from your field staff and with a valid permit issued by the Corps of Engineers.

The U.S. Army Corps of Engineers has a reputation as one of the finest coastal engineering organizations in the world. Thus, I had no reason to doubt the design prepared by your staff. They advised me that habitat restoration and enhancement would have to be the key elements of the design.

Although water supply is an important aspect of the project, as the permit specifies, bird nesting islands and deep-water habitat are the paramount features of the project. I believe that Dr. Herdendorf, a noted Lake Erie ecologist, has more than adequately described the critical need for the project and the environmental enhancements that will accrue from its completion.

Therefore, based on the guidelines for NWP 27, we do not feel that the Corps of Engineers erred in issuing the permit. If any err has occurred, it is your unwillingness to permit our experiment to be completed and tested with a long-term monitoring program.

We believe that we can reverse the degraded conditions that have occurred in east Sandusky Bay over the past several decades. Our environmental plan is sound and well

CATAWBA GARDEN CENTER

1283 N.E. Catawba Rd., SR 53 Port Clinton, Ohio 43452

419 797 9797 phone 419 797 9716 fax

within the spirit of the nationwide permit guidelines. Unfortunately, your decision appears to have dashed any hopes for accomplishing the laudable project goals.

Thus, we respectfully ask you and your office staff to view the project in this light and reconsider your decision. Your field staff is well experienced and has helped us develop a wise plan for east Sandusky Bay. We implore you to support your competent field staff; don't turn your back on them because Columbus bureaucrats can not see the value of a well-designed experiment to improve our bay.

Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "Rob Barnes", with a long horizontal flourish extending to the right.

Robert Barnes
Barnes Nursery, Inc.

6, 2002

Molly Holt, Attorney-Advisor (NOAA)
Office of the asst genl counsel for ocean svcs
1305 East-West Highway, Room 6111
Silver Springs, Maryland 20910

Denial of Section 401 Certification for Construction
of a water storage facility in a category 3 wetland by
BARNE'S NURSERY-3511 W. Cleveland Road- Huron, Ohio 44839.

Dear Ms. Holt:

1. I fully support the state of OHIO'S denial of BARNE'S NURSERY for a dike and channel dug in SHELDON MARSH WETLAND complex in July 2000.
2. As a frequent visitor to the state owned SHELDON MARSH STATE NATURE PRESERVE I take great pleasure in observing the BALD EAGLES that nest in the marsh.
 - A. With BARNE'S NURSERY diverting 350,000 gallons of water A NIGHT (18% of the water in EAST SANDUSKY BAY)
HOW LONG WILL SHELDON MARSH be a viable wetland?
 - B. The water storage facility and intake channel will take 41% of the water in EAST SANDUSKY BAY.
 - C. The endangered PIPING PLOVER nests on the marsh beaches and uses the proposed area for foraging.
3. The LAKE ERIE area is going through a natural cycle.
My research shows that the lake levels were so low in 1903 that NIAGRA FALLS ran dry in March 1903.

continued on page 2

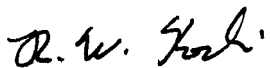
page 2

A. I realize that property owners on the lake are allowed to pump water-but not to the detriment of the state owned wetlands.

4. By his heavy handed actions Mr. Barne's has tried to circumvent state law.

5. I fully support the state in its right to deny the Barne's appeal. Please, again turn him down!

Thank You



R.W. Koski

831 Salem Drive

Huron, Ohio 44839-1438

John A. Krebs
408 Kiwanis Avenue
Huron, Ohio 44839
December 20, 2002
(419) 433-2132

Molly Holt, Attorney Advisor NOAA
Office of the Asst Gen Council for Ocean Services
1305 East-West Highway, Room 611
Silver Springs, MD 20910

RE: Barnes Nursery Appeal, Sheldon Marsh

Dear Ms. Holt:

EXHIBITS -10 HAVE BEEN SENT TO YOU HARD COPY IN THE MAIL

"Oh, what a tangled web we weave,

When first we practice to deceive"

(Sir Walter Scott)

No adage could be more apropos to the present set of circumstances than this one. When reviewing this landmark case, one has to be impressed with the question "How did something this *obviously wrong*, get started in the first place." As a 60-year resident and 50-year frequenter of the Sheldon Marsh area wetlands, perhaps I can cast some light on that subject.

In a nutshell, Army Corps actions. As stated in the Ohio Department of Natural Resources (ODNR) Initial Brief to the Secretary of Commerce, of all the agencies involved in evaluating this project, only the Corps supports it, to the point of being an "applicant (appellant) advocate", a behavior precluded in the Clean Water Act , Section 404(q) (MOA between EPA and DOA) Part I (1) [EXHIBIT 1].

The whole debacle started with an illegal NWP 27 issued *in one day* (without *any* Public input or comment) by Gary Buck, Bowling Green, Ohio Field Office of the Buffalo District of the Army Corps. This approach was probably decided on because the APPELLANT and the Corps Field Office Staff knew the success of an Individual Permit would be unlikely because it would require public scrutiny, and permits by the Ohio EPA and ODNR. In fact, Ken Multerer from U.S. Fish and Wildlife told them both that at an on-site pre-application meeting on June 14, 2000. [Exhibits 2(a) and

2(c) p2.]. Mr. Buck also knew that the area involved an emergent wetland and that an *irrigation project* would not be allowed because he himself in 1991-92 processed the regulatory action of Violation #92-475-604 of Sections 10 and 404 against Charles Corso, one of the partners of the CCCMB Partnership listed as the APPLICANT on the original NWP 27 of June 19&20, 2000. This was for “unacceptable fill” in emergent wetlands (without any permits) , which was subsequently removed.

It was likely for the above reasons that the then new NWP 27 *vehicle* was chosen (no public notices, and lack of public familiarity) and the “project purpose” changed from irrigation to “Deep Water Habitat and Nesting Islands”. (One in a long series of name changes for the project purpose, which “appeared to be a reaction to the encountered opposition.” [EXHIBIT 5, para. 1]). The project application number also changed to PCN 2000-02170 from PCN 2000-01800, which number the Corps denied ever existed, yet used themselves repeatedly in intra-agency memos and E-mails, obtained by numerous citizen F.O.I.A. requests.

This scenario included the instructions of Gary Buck to Ken Multerer to destroy a *pertinent* Federal document (probably PCN 200-01800) which he admits giving to him on June 14, 2000, in his own *reconstructed* notes of October 19, 2000. This *reconstruction* was at the direction of Michael Montone, the new Project Manager replacing Mr. Buck. The necessity of this *reconstruction* was allegedly “required as portions of my E-mail and the Regulatory RAMS file were missing”, according to Mr. Buck. [EXHIBIT 2(b) pp.1&2]. This elaborate “shell game” seems to have been concocted to stifle concerned citizens’ inquiry into the original project plans. One is puzzled by why this was necessary if Mr. Buck did not feel the whole process was suspect in the first place.

This maneuver effectively and purposefully circumvented the normal permitting process, including public comment, and denied the citizens of Ohio *their* “due process”. The series of *unlikely* errors of judgment in evaluating this proposal, and the repeated decisions made in the wrong direction should be investigated as suggested by the Sierra Club’s Glenn W. Landers. [EXHIBIT 3(a)] However, any investigation should be done by a Federal agency having oversight powers on the Army Corps such as the USEPA. It should not have been done as an “internal review” by the Buffalo District Commander, as was related to Mr. Glenn Landers in the Corps response letter. [EXHIBIT 3(b)] That would be “like the fox watching the chicken yard”. Even the Corps itself states that concept in its publication CORPS FACTS: SUBJECT: Regulatory Program Overview, Delegation of Authority. “Regulatory program management and administration is focused at the district office level, with policy oversight at higher levels”. [EXHIBIT 9 p.2]

From July 2000 until January 2001 the Buffalo District Corps proceeded to “cover its own” for 6 long months, trying to justify “compliance” to an NWP 27 Permit they knew was illegal in the first place. As late as November 2000 they apparently still convinced the Assistant Secretary of Defense for Civil Works that the NWP 27 was a

viable permit that could be “complied with” by the APPLICANT (Appellant) [EXHIBIT 6]. Finally the Corps relented to outside pressures (from USEPA, ODNR, OEPA, Ohio’s Senator George V. Voinovich, enraged private citizens and conservation groups.) [EXHIBIT 4(a,b,c,d.)] and issued its January 5, 2001 PERMIT SUSPENSION DECISION DOCUMENT. [EXHIBIT 5].

Another agonizing 11 months ensued while the Buffalo Corps stonewalled with their patented version of the “after-the-fact” individual permit process, which really should be more accurately renamed “after-the-violation” individual lawbreakers’ reward process. We wholeheartedly agree with Senator Voinovich’s comments to The Assistant Secretary of the Army (Civil Works) of September 29, 2000.

“In light of the misrepresentation on the original nationwide permit, I urge the Corps to require Barnes Nursery to fully restore the area in a timely and efficient manner. I understand that Barnes Nursery can apply for a standard permit for the impoundment but believe full restoration should be accomplished while the individual permit is being considered”. [EXHIBIT 4(a)]

Instead, the Buffalo Corps proceeded to orchestrate a farcical public comment period and public hearing, the comments of which were arrogantly trivialized and summarily dismissed as irrelevant in their Environmental Assessment (E.A.) [please refer to the State of Ohio’s Brief, EXHIBIT M, p.25 para.2] The Corps realized they didn’t have a leg to stand on with the NWP 27, so they manipulated to get into their “after-the-fact” permit process with their “RATIONALE FOR DETERMINING NWP 27 IS NOT APPLICABLE” document of January 5, 2001. [EXHIBIT 5]

They may have proverbially shot- themselves- in the foot so to speak with that document. Its reasoning has insight and applicability while the reasoning in the E.A. is diametrically opposed in almost every aspect, condoning the project. The essence of the project itself remains the same “an illegal channel and side castings (however divided, arranged, or contoured) in a Category 3 Wetlands”. It has detrimental impacts delineated in almost every category of Part 230: Section 404(b)(1) Guidelines from Subpart C 230.20-230.24, Subpart D 230.30-230.32, and Subpart E 230.40-230.43. So why would the Corps dismiss the “same project” in one breath and then resurrect it in the next with its favorable Environmental Assessment and Provisional 404 Permit?

The answer is three-part. First of all, they wanted to avoid appearing to “dump” the APPLICANT (Appellant) and incur his wrath. Secondly, they wanted to avoid retribution for the illegally issued NWP 27 by making it appear that the NWP27 issue was not “germane” since *their* “regular” permitting process deemed the project to be “permissible” anyway.[EXHIBIT 3(b) p.2,para.1] Of course it made no difference to the Corps that the previous comments by the USEPA, USF&W, ODNR, and OEPA did not agree with any of their highly subjective interpretations of pertinent 404 (b)(1) criteria, etc. in their EA. Thirdly, they knew that interagency safeguards such

as this CZMA Consistency Objection [EXHIBIT 8 p. 2] and the OEPA denial of the 401 Permit would in all likelihood block their Provisional 404 Permit and prevent the release of the wrath of the general public on them in the national media and CONGRESS.

When the NWP27 was rescinded in January 2001, the APPLICANT (Appellant) advised the Buffalo District Engineer that "If any err has occurred, it is your unwillingness to Permit *our experiment* to be completed and tested with a long-term monitoring program". Your field staff is well experienced and has helped us develop a wise plan for East Sandusky Bay. We implore you to support your competent field staff; don't turn your back on them because Columbus bureaucrats can't see the value of a well-designed *experiment* to improve *our bay*". [EXHIBIT 10]

The citizens of Ohio do not want any "*experiments*" in a sensitive wetland adjacent to and contiguous with *their* Sheldon Marsh State Nature Preserve, especially by anyone as inexperienced in such matters as the APPELLANT and his HIRED CONSULTANT. Basically, no experience, no experiment! Unfortunately the Corps has listened to the APPELLANT'S whining about the Corps' "dashing of any hopes for accomplishing the laudable project goals"[EXHIBIT 10 p.2] and granted them a Provisional 404 Permit to *experiment*. Fortunately there are checks and balances such as the CZMA Consistency Objection to prevent such bizarre decisions from coming to fruition. The citizens of Ohio hope you will help us to that end, and uphold and refuse to override the State's Consistency Objection.

We agree with and support ODNR's Initial Brief stating that the APPELLANT's proposed activity is not consistent with the objectives and purposes of the CZMA And does not satisfy any of the three requirements under 15CFR 930.121.

Finally, is the subject of the Army Corps' flagrant misuse of AFTER-THE-FACT PERMITS, which act to protect and reward wetland law violators. In cases like this, restoration of the violation should come first, followed by the regular permitting process. As is, it sends the message to would be violators "go ahead and start without permits and more than 90% of the time we'll O.K. it later with an after-the-fact permit". We are afraid that if this landmark case does not send the appropriate message to the Corps and would be violators, sensitive wetlands nationwide will be "up for grabs".

Sincerely yours,

John A. Krebs, M.D.

Friends of Sheldon Marsh

A handwritten signature in black ink, appearing to read "J. Krebs", written over the typed name.

ROGER GUTSCHMIDT
22290 HABER DRIVE
FAIRVIEW PARK, OH 44126

440/734-0759

Molly Holt, Attorney-Adviser NOAA
Office of the Asst. General Counsel for Ocean Services
1305 East-West Highway
Silver Springs, MD 20910

Dear Attorney Holt:

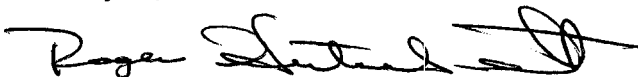
I am concerned over the Barnes Nursery Project appeal. It should not be granted. All permitting state and federal agencies have recommended denial of this project permit.

Barnes' personnel went about this project start to finish in a deceptive manner. Rather than the consideration of an appeal, they should be reprimanded and told to put the land back the way it was and begin acting like responsible businessmen.

From personal experience, reestablishing small amphibians on my own property, I was made very aware of how a small change can create a major collapse in plant-animal populations. The Barnes project represents such a change and poses a serious threat to Sheldon Marsh.

The licensing parties have ruled justly in stating the dyke and channel must go. Please close the book on this matter and rule for the citizens of Ohio.

Thank you,

A handwritten signature in black ink, appearing to read "Roger Gutschmidt", with a stylized flourish at the end.

Roger Gutschmidt

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Sincerely yours

John F. Smith

President of Black River Audubon
Society

President of Coalition
of Ohio Audubon Chapters

Director of Audubon Ohio
(NAS) National Audubon Society

DEAR Molly Holt

writing you concerning the project that BARNES
Nursery Huron Ohio has initiated THE channel and Dike
that the BARNES Nursery has constructed will adversely affect this
unique ecosystem I believe

As an AVID Bird watcher I feel compelled to te you
to generate as much adversity to this project as possible ~~there~~

I believe that the creat of the DIKE will DEFINATELY
ALTER THE MARSH ECOSYSTEM WHICH IS WHEN I-94 to begin with

Im CERTAIN that they CAN find AN ALTERNATIVE way
to source their WATER NEEDS than to possibly DESTROY the
SHELDON MARSH PresERVE

Sincerely Hyc Kd

HENRY C KORECKO
15818 E DARROW RD
VERMILION OH
44089

Subj: Fwd: mollyholtattorneyadviser noaa
Date: 12/21/02 2:32:17 PM Eastern Standard Time
From: sjmdjm@webtv.net
To: johnovid@aol.com
Sent from the Internet (Details)

Received: from smtplocal-2001-1.public.lawson.webtv.net (172.16.212.85) by storefull-2115.public.lawson.webtv.net with WTV-SMTP; Sat, 21 Dec 2002 10:23:57 -0800 (PST)

Received: by smtplocal-2001-1.public.lawson.webtv.net (WebTV_Postfix) id 3CBCBBE06; Sat, 21 Dec 2002 10:23:57 -0800 (PST)

Delivered-To: sjmdjm@webtv.net

Received: from storefull-2116.public.lawson.webtv.net (lawson-public-ip:mx-2-pip-2.public.lawson.webtv.net [209.240.212.6]) by smtplocal-2001-1.public.lawson.webtv.net (WebTV_Postfix) with ESMTP id 0B34FBE07 for <sjmdjm@webtv.net>; Sat, 21 Dec 2002 10:23:57 -0800 (PST)

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X-WebTV-Signature: 1

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From: sjmdjm@webtv.net (steve macionsky)

Date: Sat, 21 Dec 2002 13:23:57 -0500 (EST)

To: sjmdjm@webtv.net

Subject: mollyholtattorneyadviser noaa

Message-ID: <23218-3E04B1BD-1770@storefull-2116.public.lawson.webtv.net>

Content-Disposition: Inline

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Content-Transfer-Encoding: 7Bit

MIME-Version: 1.0 (WebTV)

1st dig. july 2000. i live next door to the marsh in a 4 story condo and also have an 80 foot light house next to me. you could say i see it all and no one else can. i watched this destruction for a few days since i had notified the odnr. barnes did not notify any state agencies. i thought it was strange to dig a 52 foot wide by 10 feet deep. as my mind worked overtime, unlike all state and federal agencies

found out that this venture was started by a wealthy group of partners.

CCCMB

corso, corso, cedar fair (cedar point) murray and barnes. why would they help

barnes try and steal water from the marsh by the way way it took 3 weeks to give me that information. was this ditch going to be for a marina and condos and single

family homes? the 5 properties were connected, closing 2 sides of the marsh.

we have about 2,000 concerned citizens

and agencies and professional organizations. honesty always pays and lies and always loose. the ditch has already caused a great deal of damage.

i am not a biologist, but have talked to

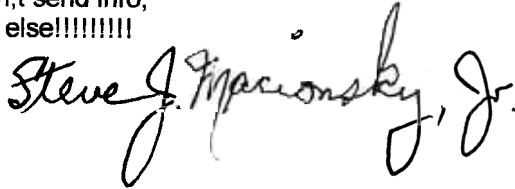
many since it started. this is the most devastating project any have seen.

mr. barnes should restore the entire thing

back to its original condition !!!!
restoration to the original condition of the marsh complex to bring this
area into
consistency with ohio's coastal management plan.

if interested.....i have about 500 pages
from the freedom of information act.
some others we no sent to me. we
should be be very spectacle about the
army corps. if they don,t send info,
i get it from some one else!!!!!!!
thank you

steve j. macionsky, jr
23 cedar point road
sandusky, oh 4870
419-626-610

A handwritten signature in cursive script that reads "Steve J. Macionsky, Jr." The signature is written in dark ink and is positioned to the right of the typed name.

Oxford Audubon Society
Box Box 556, Oxford, OH 45056
December 19, 2002

Ms. Molly Holt
Office of the Asst Genl Counsel for Ocean Svcs
1305 East-West Highway
Silver Springs MD 20910

Dear Ms Holt:


The Oxford Audubon Society fully supports the State of Ohio's position on the inconsistency of the Barnes Nursery Project with the Coastal Zone Management Act for the Sheldon Marsh wetland.

We feel that the regulations of the Coastal Zone Management Act are being disregarded as the nursery project does not meet the requirements of the Act.

We join with others in requesting restoration of the Sheldon Marsh wetland by removal of the Barnes Nursery dike and channel, and returning the Marsh to its original pre-construction condition.

If allowed to remain, this dike and channel will set an illegal precedent that will undermine the laws of this country designed to protect unique wetland and coastal habitat.

We urge your concurrence with the State of Ohio in denying the consistency of the Barnes Nursery Project with the Coastal Zone Management Act.

Sincerely,

William C. Heck
President, Oxford Audubon Society

*Patricia A. Dwight
3219 West Cleveland Road
Huron, Ohio 44839*

December 18, 2002

Molly Holt
U.S. Department of Commerce, NOAA
1305 East-West Highway, Room 6111
Silver Spring, MD 20910

Dear Ms. Holt,

As neighbors to the Barnes Nursery agribusiness, my husband and I have a strong interest in the restoration of Sheldon Marsh State Nature Preserve to its original condition. We have tried to steward our property of 29 acres in a manner consistent with its proximity to the Sheldon Marsh SNP. We have worked out a conservation easement of the northern 8.6 acres of our property with the state of Ohio. This is the portion which is adjacent to the Sheldon's SNP and part of the marsh. In the southern 15 acres we have planted over 8,000 hardwood trees and pines. We have done this in conjunction with state of Ohio foresters' plans in an effort to create a buffer to Sheldon's from encroaching development.

We have been deeply disappointed by the Barnes' dike and channel construction in Sheldon Marsh waters. This has been a blatant effort on their part to circumvent our wetland laws in place in order to further only their own business. In addition, it is not clear what the original intent of the channel and dike were, since they were created two and one-half times wider than the improper Army Corps of Engineers permit (NWP 27) allowed. The project purpose has changed at least twice, masterminded by an eager consultant and lawyer. Had the money paid to these individuals been used to properly research alternatives to water supply, Sheldon Marsh would likely be restored to lay, and Barnes might also have adequate water for the container farm.

The existence of this illegal project has gone on much too long. It now becomes your unfortunate responsibility to make right the convoluted situation that this has become. There is no doubt that the Barnes' dike and channel do not conform to the state of Ohio's Coastal Zone Management Program. I served two years on the Coastal Zone Advisory Council when our state was working on drafting this document. It was a long, long time in coming with many redrafts as you know. We are not sitting on the strongest coastal plan in the country, and yet Mr. Barnes' project was ruled "inconsistent" with our state's program. In all the documents which Barnes' consultant and lawyers have drafted, none have managed to change that fact.

There is no national interest served by this dike and channel remaining in place. Rather, the interest of the people of this nation in preserving a fine barrier beach lagoon in northern Ohio has been upended by this project. People from all over this country have and continue to come to this nature preserve. It has been designated an "Important Bird Area" by the National Audubon Society. The existence of this marsh preserve is threatened by the Barnes' channel that is filled with water even in dry times. The channel is clearly not only collecting upland runoff, but also acting as a sump, draining water from the rest of the marsh. A few more years of this and Sheldon Marsh SNP will cease to exist as in its former state. Those plants and animals dependent on hydric soils will have perished from the area.

The Ohio EPA has recommended denial of the 401 water quality permit which Barnes also needs for the Army Corps permit. Despite mounting evidence to the contrary, Barnes continues his appeals. Using the "provisional" permit that the Corps issued as justification for the project, is highly improper. The Ohio

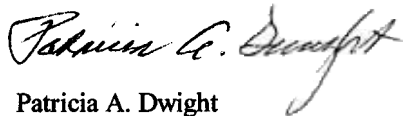
Attorney General stated that the Corps cannot issue a provisional permit when a State objection is pending.

Alternatives for water supply do exist. Many have been suggested such as ponds, city water, use of free flowing water from the marsh in normal lake level years, or moving the container operations to a more favorable location since their business has outgrown its present location. Considering the amount of funds already expended to keep this dike and channel project in place, it is likely that Barnes Nursery has sufficient monetary resources to put toward acquiring alternative water source(s) on a continuing basis.

In short, the restoration of Sheldon Marsh to its pre-construction condition is the only way that the national interest can be served in this instance. Please help end this ongoing debacle that is threatening the life blood of our marsh. So many have worked so hard over the years to preserve this place. Many continue to do so. Comments have numbered in the thousands opposing this project. We need to stave off this current threat, and assure that this fine area will be here to be enjoyed by the generations to come.

Thank you for your consideration in this appeal.

Sincerely,

A handwritten signature in cursive script, appearing to read "Patricia A. Dwight".

Patricia A. Dwight

Dec 15, 2002

Dear Ms. Holt,

This letter is part of the public comment period to NOAA concerning an issue in Ohio. As a Citizen of Ohio I support the State of Ohio's denial of Coastal consistency of the Barnes Nursery project (dike and channel) dug in Sheldon Marsh wetland complex in July of 2000.

This dike and channel in a top rated Category III Wetland is not a benefit to the National Interest. The rights and due process of the law were denied to the people of Ohio as Barnes Nursery circumvented the required authorizing State agencies required on the original Army Corps of Engineers (ACE) permits which was applied for one day and granted the next, allowing no time for scrutiny - Barnes did not notify any adjoining property owners and held no public information sessions which would have alerted agencies and Ohio citizens of the ^{many} adverse coast effects this project would have - alternatives exist, of which Barnes have not thoroughly investigated. The burden of proof ~~proven~~ of consistency with the Coastal Zone Management Act (CZMA) lies with Barnes and they have failed to produce this information. Plus they dug their project in the middle of the growing season without any silt fence and without concern for the plant, invertebrate, amphibian, water of the area, not to mention the total lack of concern for our Sheldon Marsh State Nature Preserve.

Over 90% of the wetlands have been drained in Ohio over the past couple of hundred of years. We now have laws to protect these wetlands. They are a valuable resource with many benefits to humans and many other species. Sheldon Marsh State Nature preserve is a top rated category III wetland. Barnes nursery is adversely affecting this wetland due to illegally installing a dike and channel, disregarding viable alternatives. Barnes nursery project is not consistent with the objectives of CZMA. This project is not a benefit to the national interest. Please support the State of Ohio's denial of Coastal Consistency of the Barnes Nursery project (dike and channel) dug in Sheldon Marsh wetland complex in July of 2000. Thank you.

Sincerely,

Julie Nieset
JNS

Julie Nieset
715 Franklin Ave
Kent OH 44240
eluj4@yahoo.com